



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 16, 1996

Ms. Kathleen Billingsley Purvis
Attorney at Law
2806 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 76102

OR96-2414

Dear Ms. Purvis:

You represent the Gainesville Independent School District (the "district"). On behalf of the district, you have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102403.

The district received a request from an employee for records that "touch upon the quality of my performance as an employee." You indicate that the district has provided this requestor with some responsive documents. However, you assert that other documents at issue are protected from disclosure pursuant to the informer's privilege aspect of section 552.101 of the Government Code, common-law privacy¹, false-light privacy, and federal law. You contend that the documents at issue are protected from disclosure pursuant to sections 552.103(a), 552.107, 552.111, and 552.114.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Texas courts long have recognized the informer's privilege, see *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928), and it is a well-established exception under the Open Records Act. Open Records Decision No. 549 (1990) at 4. However, for information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. See Open Records Decision Nos. 515 (1988) at 2-5, 391 (1983). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision Nos. 549 (1990) at 5, 202 (1978) at 2 (informer's

¹You alleged privacy interests pursuant to sections 552.101, 552.102, and 552.305.

privilege exception not applicable when identity of informer is known to subject of communication). In *Rovario v. United States*, 353 U.S. 53 (1957), the United States Supreme Court stated:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the *identity of persons who furnish information of violations of law* to officers charged with enforcement of that law. . . .

353 U.S. at 59 (emphasis added).

Some of the documents allege actions that could be violations of civil or criminal laws, but do not identify the informants. Other documents identify individuals, but allege actions that do not appear to violate civil or criminal laws. In Open Records Decision No. 515 (1988), this office determined that the informer's privilege is inapplicable to written statements and memoranda complaining of an employee's work performance when those statements do not reveal crimes or the violations of specific laws to the officials charged with enforcing those laws. None of the documents at issue are protected under the informer's privilege.²

Some documents contain information that you assert could place certain employees in a false light. In Open Records Decision No. 579 (1990) at 7, this office stated that the purpose of the Open Records Act "is best served by the disclosure of even doubtful information, even if embarrassing, if it relates to the conduct of the public's affairs." See *Id.* at 3-8 (section 552.101 does not incorporate the tort of false light privacy, overruling prior decisions to the contrary). The test for whether information should be withheld from disclosure under common-law privacy as incorporated in either section 552.101 or 552.102 of the Government Code is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); see also *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) (applicability of common-law privacy doctrine to records of sexual harassment allegations).

The records at issue generally relate to the job performance and work behavior of public servants. There is a legitimate public interest in how a public servant conducts himself while on-duty and how he performs his job functions. Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees); 423 (1984) at 2 (scope of public employee privacy is narrow). However, some information in the submitted documents is protected from public disclosure by

²We note that the informer's privilege is also inapplicable when the accused person knows the identity of the complainant.

common-law privacy. We have marked the information that is protected by common-law privacy and may not be disclosed to the requestor.³

Some submitted documents contain information that is protected from disclosure pursuant to sections 552.026 and 552.114 of the Government Code, and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), title 20 of the United States Code, section 1232g. Under section 552.114(a), you must withhold "information in a student record at an educational institution funded wholly or partly by state revenue." Section 552.026 provides that education records may not be disclosed unless released in conformity with FERPA requirements. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases identifying information in a minor student's records without parental consent. 20 U.S.C. § 1232g(b)(1). We have marked the information that must be withheld under FERPA and section 552.114.

There are medical records, access to which is governed by provisions of the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, rather than chapter 552 of the Government Code.⁴ Open Records Decision No. 598 (1991). Section 5.08(b) and (c) of the MPA provide:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) also requires that any subsequent release

³We note that some of the information at issue implicates the requestor's own common-law privacy interests. However, we did not mark this information as the district may not withhold information from a requestor that implicates that individual's own privacy interests. Gov't Code § 552.023. However, you should redact confidential information about the requestor prior to any public release of the records.

⁴We marked several documents concerning the requestor's own records that appear to be subject to the Americans with Disabilities Act of 1990 (the "ADA") 42 U.S.C. § 12101 *et seq.* In Open Records Decision No. 641 (1996), this office determined that medical information obtained pursuant to the ADA is confidential under section 552.101 of the Government Code in conjunction with the ADA. 42 U.S.C. § 12112. See also 29 C.F.R. § 1630.14(b)(1) (providing that medical information "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record").

of medical records be consistent with the purposes for which the district obtained the records. Open Records Decision No. 565 (1990) at 7. For your convenience, we marked the medical records.

You also assert that certified agendas, tapes, transcripts, and notes of executive session meetings of the district's board of trustees are confidential by law. Section 551.146 of the Government Code provides that it is a criminal offense to disclose to a member of the public a certified agenda or tape recording of a closed meeting. A certified agenda or tape recording of a closed meeting is available for public inspection and copying only under a court order. Gov't Code § 551.104. Thus, the district's certified agendas or tape recordings of closed meetings are confidential by law. Gov't Code § 552.101; Open Records Decision No. 563 (1990) at 6. However, records that were discussed in a closed meeting and records created in a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. Open Records Decision No. 605 (1992).

For your convenience, we have marked information in the submitted records that may be confidential under section 552.117 of the Government Code. Sections 552.024 and 552.117 provide that a public employee or official can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. You must withhold this information if, as of the time of the request for the information, an employee had elected to keep this information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987).

You contend that section 552.103(a) excepts all of the records at issue from disclosure. To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. This office has found that litigation was not reasonably anticipated when an applicant who was rejected for employment hired an attorney, and the attorney as part of his investigation asked for information as to why his client was rejected. Open Records Decision No. 361 (1983). You have not shown the applicability of section 552.103(a) to these records.⁵

You assert that some of the records at issue are excepted from disclosure pursuant to section 552.107(1) of the Government Code. Section 552.107(1) excepts from disclosure communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1, 574 (1990) at 3, 462 (1987) at 9-11. Section 552.107(1) does not except from disclosure factual recounting of events or

⁵We note that even if section 552.103(a) were applicable, it would not protect from disclosure the records which this requestor has seen. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

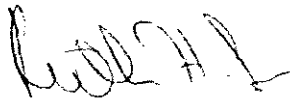
the documentation of calls made, meetings attended, and memos sent. Open Records Decision No. 574 (1990) at 5. We have marked the documents to show the portions that can be withheld from disclosure pursuant to section 552.107(1).

You also contend that certain documents are excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure interagency or intra-agency communications "consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body." Open Records Decision No. 615 (1993) at 5. This office previously held that section 552.111 was applicable to the advice, opinion and recommendations used in decision-making processes within an governmental entity. Open Records Decision Nos. 574 (1990) at 1-2; 565 (1990) at 9. However, in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the court addressed the proper scope and interpretation of this section. In light of that decision, this office re-examined the scope of section 552.111 in Open Records Decision No. 615 (1993).

In Open Records Decision No. 615 (1994) we determined that in order to be excepted from disclosure, the advice, opinion, and recommendation must be related to policymaking functions of the governmental body rather than to decision-making concerning routine personnel and administrative matters. The information at issue concerns personnel or administrative matters rather than the district's policymaking functions. Thus, none of the records submitted to this office is excepted from disclosure pursuant to section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 102403

Enclosures: Submitted documents